

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RENAE JOY SWAIM *ex rel.* CLINTON
LEE SWAIM, *et al.*,

Case No. 3:21-cv-00502-ART-CSD

ORDER

Plaintiffs,

v.

STATE OF NEVADA *ex rel.* NEVADA
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
PUBLIC AND BEHAVIORAL HEALTH,
et al.,

Defendants.

Plaintiff Renae Joy Swaim (“Ms. Swaim”) brings this action as Special Administrator of the Estate of Clinton Lee Swaim (“Mr. Swaim”), her husband; as parent and custodian of Clinton Thomas Swaim, Jr., and minor K.R.S.; and individually, for the death of Mr. Swaim by suicide while he was committed to the custody of Lake’s Crossing Center (“Lake’s Crossing”), a psychiatric facility operated by the Nevada Department of Health and Human Services, Division of Public and Behavioral Health (“DPBH”). Before the court are: (1) the State of Nevada *ex rel.* DPBH’s motion to dismiss the State of Nevada *ex rel.* DPBH for lack of subject matter jurisdiction by virtue of Eleventh Amendment immunity (ECF No. 6); and (2) individual defendants Brandon Taylor, John West, Rick Meier, Luiz Orozco, Nicholas Patiga, Vivian Davis, Samantha Lyons, Tanner Trout, and Erick McBride’s motion to dismiss for failure to state a claim (ECF No. 16), to which the remaining individual defendants Lacey Patiga, Joel Gomez, David Atherton, Matt Bowman, Daiki Branch, James Cameron, Isaac Flores, Chris Henry, and Brad Mitchell have joined (ECF No. 30). For the reasons set forth in this order, the Court grants the State of Nevada *ex rel.* DPBH’s motion to dismiss and grants in part and denies in part the individual defendants’ motion to dismiss.

I. BACKGROUND

Ms. Swaim filed her complaint in this Court on December 7, 2021. (ECF No. 1 (“Complaint”).) According to Ms. Swaim’s complaint, Mr. Swaim was a retired Washoe County Sheriff’s Deputy and suffered in his life from bipolar disorder and depression. (*Id.* at ¶¶ 30–31.) On October 2, 2019, Mr. Swaim suffered an acute episode wherein he left his home and was observed wandering in a retail parking lot in Sparks, Nevada without a shirt or shoes. (*Id.* at ¶¶ 32–33.) The Sparks Police Department arrived and determined that Mr. Swaim should be detained for lack of ability to care for himself. (*Id.* at ¶¶ 34–35.) Mr. Swaim had no prior criminal convictions. (*Id.* at ¶ 39.)

Mr. Swaim was transported to Renown Regional Medical Center and placed in a hospital room. (*Id.* at ¶¶ 35–36.) Mr. Swaim began to shake and indicated that he was cold as a medical technician checked Mr. Swaim’s vital signs. (*Id.* at ¶ 36.) During this initial evaluation, Mr. Swaim suddenly attacked the medical technician by jumping up and squeezing the medical technician’s neck with his arm. (*Id.* at ¶ 37.) Sparks Police Department officers in the room tased and subdued Mr. Swaim and Mr. Swaim was charged with one count of Battery on a Protected Person by Strangulation, a Category B felony. (*Id.* at ¶¶ 38–39.) Pursuant to an order from the Justice Court of Reno Township, Mr. Swaim submitted to a competency evaluation at Lake’s Crossing, a psychiatric facility operated by DPBH. (*Id.* at ¶¶ 4, 40.) He was deemed not competent to proceed and ordered committed to Lake’s Crossing, where he appeared on November 14, 2019. (*Id.* at ¶¶ 41–42.)

At Lake’s Crossing, Mr. Swaim was put on suicide watch. He was initially designated for “constant” watch due to suicide risk, and then sometime thereafter was reclassified for “Q15 Special” watch, which, according to Lake’s Crossing policy, required consistent visual observation of “clients,” including that all head counts and special watches include visual contact with the client which may

1 require pulling back bed covers and using lights to ascertain the client's physical
2 condition. (*Id.* at ¶¶ 43–44.) Lake's Crossing policy also required that any client
3 on suicide watch not be allowed any items in their rooms without written
4 approval. (*Id.* at ¶ 45.)

5 According to Plaintiff's complaint, on December 8 and 9, 2019, Mr. Swain's
6 demeanor changed noticeably. (*Id.* at ¶ 48.) On the night of December 9, Mr.
7 Swaim committed suicide using his own bedsheet. (*Id.* at ¶ 47.) Mr. Swaim was
8 found at approximately 8:26 on the morning of December 10, 2019. (*Id.* at ¶ 51.)
9 A report of an investigation undertaken by the Department of Public Safety
10 describes several significant policy violations by Lake's Crossing staff, including
11 that Mr. Swain had gained access to extra bed linens, that it would have been
12 virtually impossible to see inside Mr. Swaim's room when staff members checked
13 the rooms via "quick walk-by's," and that no staff member entered Mr. Swaim's
14 room to assure visual recognition of Mr. Swaim's condition at any time on the
15 night of December 9, 2019, according to video surveillance footage. (*Id.* at ¶ 52.)
16 Furthermore, another Lake's Crossing client heard noises coming from Mr.
17 Swain's room and attempted to alert a staff member, Gomez, who reportedly took
18 no action. (*Id.*)

19 Ms. Swaim named the State of Nevada *ex rel.* Division of Public and
20 Behavioral Health of the Department of Health and Human Services as a
21 defendant alongside eighteen individual staff members of Lake's Crossing and ten
22 Doe defendants. The individual staff member defendants, sued in their individual
23 capacities, are David Atherton, Matt Bowman, Daiki "Sam" Branch, James
24 Cameron, Vivian Davis, Isaac Flores, Joel Gomez, Chris Henry, Samantha Lyons,
25 Erick McBride, Rick Meier, Brad Mitchell, Luis Orozco, Lacey Patiga, Nicholas
26 Patiga, Brandon Taylor, Tanner Trout, and John West. Ms. Swaim brings four
27 claims: (1) deliberate indifference to a serious medical need against all
28 defendants; (2) wrongful death against all defendants; (3) negligence against all

defendants; and (4) negligent hiring, training, selection, and supervision against the State of Nevada *ex rel.* DPBH.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The State of Nevada *ex rel.* DPBH argues that it should be dismissed from this case because an action in federal court for money damages against a state or a state agency is barred by the Eleventh Amendment. (ECF No. 6 at 3.) The State of Nevada *ex rel.* DPBH argues that because Ms. Swaim seeks money damages from the State of Nevada arising out of the suicide of Mr. Swaim, the action against State of Nevada *ex rel.* DPBH falls squarely within the barrier set forth by the Eleventh Amendment. The State of Nevada *ex rel.* DPBH notes that Congress did not abrogate this immunity by enacting 42 U.S.C. § 1983 nor does Nevada waive this immunity. (*Id.* (citing NRS 41.031(3) (“The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.”).))

A state agency is generally protected from suit in federal court by the Eleventh Amendment. *Howlett v. Rose*, 496 U.S. 356, 365, (1990) *See also Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017) (explaining that agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief). States and state agencies are not “persons” for the purposes of § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Cornel v. Hawaii*, 37 F.4th 527, 531 (9th Cir. 2022) (stating that States or governmental entities that are considered “arms of the State” for Eleventh Amendment purposes are not “persons” under § 1983). Therefore, the State of Nevada and DPBH are protected by Eleventh Amendment immunity and cannot be sued under § 1983, which does not abrogate this immunity, nor is a cause of action available under *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978). *See*

1 *Krainski v. Nevada ex re. Bd. Of Regents of Nevada System of Higher Educ.*, 616
2 F.3d 963, 967 (9th Cir. 2010) (acknowledging, based on *Will*, 491 U.S. at 70–71,
3 that the Supreme Court has expressly declined to extend *Monell*'s theory of
4 municipal liability under § 1983 to state entities).

5 Regarding the state tort claims, Plaintiffs' argument that Nevada has
6 constructively waived its Eleventh Amendment immunity by enacting an
7 indemnification statute is unavailing. The Supreme Court has explained its
8 reluctance to imply such a waiver, stating, "In deciding whether a State has
9 waived its constitutional protection under the Eleventh Amendment, we will find
10 waiver only where the state "by the most express language or by such
11 overwhelming implications from the text as will leave no room for any other
12 reasonable construction." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483
13 U.S. 468, 473 (1987) (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)); *see*
14 *also PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262 (2021)
15 (requiring "unequivocal textual evidence" that a state has waived its Eleventh
16 Amendment immunity). Plaintiffs argue that Nevada's indemnification statute,
17 contained in Chapter 41 of the Nevada Revised Statutes, implicitly waives
18 Eleventh Amendment immunity because those provisions compel the state to
19 defend and indemnify its present and former employees in any civil action relating
20 to the person's public duties or employment. (ECF No. 7 at 8.) Plaintiffs reasoning
21 is contradicted by NRS 41.031(3), also in Chapter 41, which expressly provides
22 that the state does not waive its Eleventh Amendment immunity. *See also Riggle*
23 *v. State of Cal.*, 577 F.2d 579, 585 (9th Cir. 1978) (holding that California's Tort
24 Claims Act did not waive the state's immunity in federal court even though the
25 state could be sued in its own courts). This textual evidence points in favor the
26 State's Eleventh Amendment immunity, not against it.

27 Finally, Ms. Swaim also argues that the State of Nevada *ex rel.* DPBH
28 should be retained in this action by virtue of Nevada's mandatory joinder statute,

1 NRS 41.0337, which requires that the State or appropriate political subdivision
2 be named as a party to any tort action arising out of an act or omission within a
3 public employee's duties. Ms. Swaim argues that the state tort claims are "so
4 related to claims in this action within the Court's original jurisdiction that they
5 form part of the same case or controversy and also form the basis for this Court's
6 supplemental jurisdiction[.]" In other words, Ms. Swaim argues that since
7 supplemental jurisdiction over the state tort claims is proper, the State of Nevada
8 *ex rel.* DPBH must be retained notwithstanding NRS 41.0337.

9 In *Craig v. Donnelly*, 439 P.3d 413 (Nev. App. 2019), the Nevada Court of
10 Appeals held that "while a plaintiff must name the State as a party to any state
11 tort claims in order to comply with NRS 41.031 and NRS 41.0337, this statutory
12 requirement does not apply to 42 U.S.C. § 1983 claims, even when brought in
13 the same complaint as a plaintiff's state tort claims. Indeed, the State cannot be
14 named as a party to a plaintiff's § 1983 civil rights claims." *Id.* at 414. In *Craig*,
15 the Nevada Court of Appeals addressed whether a plaintiff had to name the State
16 as a party in a state court case. *See id.* at 413. With respect to federal court cases,
17 in *Stanley v. Trustees of California State Univ.*, 433 F.3d 1129, (9th Cir. 2006),
18 the Ninth Circuit held that 28 U.S.C. § 1367 does not abrogate state sovereign
19 immunity for supplemental state law claims. *See id.* at 1133–34. If the Court
20 lacks jurisdiction over a necessary party to a pendant state tort claim, the Court
21 lacks supplemental jurisdiction over the claim. *Hirst v. Gertzen*, 676 F.2d 1252,
22 1264 (9th Cir. 1982). Since the State of Nevada *ex rel.* DPBH must be dismissed,
23 the state tort claims against all defendants must be dismissed for lack of subject
24 matter jurisdiction.¹ Ms. Swaim must raise her state tort claims in state court.

25
26 ¹ Ms. Swaim "requests that the Court take judicial notice of the voluminous history of litigation,
27 particularly in the context of § 1983 civil rights actions initiated by inmates incarcerated by the
28 State and the Nevada Department of Corrections ("NDOC") in which the AG defends the NDOC[.]"
(ECF No. 7 at 8.) However, the Court consistently holds that inmate actions in this Court against
the NDOC directly are barred by the Eleventh Amendment and that state tort actions must be

1 See *Johnson v. Virus*, 2022 WL 6265989, at *6 (D. Nev. May 18, 2022).

2 **III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

3 What remains in this case is Ms. Swaim’s deliberate indifference to a
 4 serious medical need claim against the eighteen individual defendants. A court
 5 may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 6 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
 7 provide “a short and plain statement of the claim showing that the pleader is
 8 entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 9 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it
 10 demands more than “labels and conclusions” or a “formulaic recitation of the
 11 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
 12 *Twombly*, 550 U.S. at 555). All factual allegations set forth in the complaint are
 13 taken as true and construed in the light most favorable to the plaintiff. *Lee v. City*
 14 *of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). Thus, to survive a motion to
 15 dismiss, a complaint must contain sufficient factual matter to “state a claim to
 16 relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
 17 U.S. at 570).

18 The elements of a pretrial detainee’s medical care claim against an
 19 individual defendant under the due process clause of the Fourteenth Amendment
 20 are: (1) the defendant made an intentional decision with respect to the conditions
 21 under which the plaintiff was confined; (2) those conditions put the plaintiff at
 22 substantial risk of suffering serious harm; (3) the defendant did not take
 23 reasonable available measures to abate that risk, even though a reasonable
 24 official in the circumstances would have appreciated the high degree of risk
 25 involved—making the consequences of the defendant’s conduct obvious; and (4)

26 _____
 27 brought in state court by virtue of the mandatory joinder statute. See, e.g., *Wilson v. Nevada Dep’t*
 28 *of Corr.*, 2008 WL 5451001, at *1 (D. Nev. Dec. 31, 2008) (dismissing NDOC); *Lewis v. Dzurenda*,
 2021 WL 8775770, at *9 (D. Nev. Feb. 1, 2021) (dismissing state tort claims). As in the instant
 case, what remain are typically § 1983 claims against individuals.

1 by not taking such measures, the defendant caused the plaintiff's injuries.
2 *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018).

3 The individual defendants argue that Ms. Swaim's complaint should be
4 dismissed for failure to state a claim because Ms. Swaim's complaint does not
5 describe what any of the individual defendants did wrong with specificity. The
6 individual defendants state that "Plaintiffs' allegations are all against 'staff'" and
7 that "Plaintiffs have merely recited the elements of various claims and inserted
8 all the defendants into those elements[.]" noting that "[t]he only individual
9 described as failing to conduct a check of the decedent is defendant Gomez[.]"
10 and that "the only individuals who are even described are defendants, Gomez and
11 Bostwick." (ECF No. 16 at 2–3.) However, Bostwick is described as a fellow Lake's
12 Crossing resident, not an employee, who attempted to alert Gomez to a possible
13 issue with Mr. Swaim and is not named as a defendant. (Complaint at ¶ 52.) The
14 individual defendants also argue that Ms. Swaim's complaint contains no facts
15 showing the personal participation of any individual defendant required for a
16 § 1983 claim, nor facts showing that any individual defendant made an
17 intentional decision required for a deliberate indifference claim, as well as that
18 qualified immunity applies and that there is no private right of action for money
19 damages under Article 1, § 8 of the Nevada Constitution.²

20 Ms. Swaim responds that the "allegations against each Defendant are
21 clearly enumerated, even if and where the Defendants may be referred to
22 collectively." (ECF No. 17 at 8.) Ms. Swaim points to language from the complaint
23 stating that "each individually named Defendant, all of whom were Forensic
24 Specialists on duty and on watch . . . made an intentional decision to not follow
25 applicable and governing Lake's Crossing policy with respect to the consistent
26 and timely (no less than every fifteen minutes) visual observation of Mr. Swaim,

27 ² The individual defendants also argue that Ms. Swaim's negligent training, hiring, selection, and
28 supervision claim is foreclosed as a matter of Nevada law. Since this claim is dismissed for lack
of subject matter jurisdiction, the Court need not reach this argument.

1 to check to see if there was movement and to assure visual contact, recognition,
2 and ascertainment of physical condition.” (*Id.* at 9.) Ms. Swaim also alleges that
3 the individual defendants failed to prevent Mr. Swaim from gaining access to an
4 additional bedsheet, which contravened Lake’s Crossing policy for residents on
5 suicide watch. (Complaint at ¶ 45.) Ms. Swaim also proffers the February 10,
6 2021, Department of Public Safety Report for Investigation Division Case
7 19I0000764 (“Report”) which was referenced in the complaint.³ (*Id.* at ¶ 52; ECF
8 No. 17-1.)

9 Ms. Swaim’s complaint states claims against the individual defendants.
10 Ms. Swaim alleges that each individual defendant knew of Mr. Swaim’s suicide
11 watch status and nonetheless failed to follow pertinent Lake’s Crossing policies
12 for residents on suicide watch, including the room check policy and the policy
13 against residents on suicide watch having access to items in their rooms such as
14 additional linens. (*E.g.*, Complaint at ¶ 59.) Construed in the light most favorable
15 to Ms. Swaim, these allegations are sufficient to state a deliberate indifference
16 claim because, taking the allegations as true, the individuals made an intentional
17 decision to disregard these policies while knowing Mr. Swaim was on suicide
18 watch, leading to Mr. Swaim’s death by suicide. Furthermore, although defendant
19 Gomez is the only individual defendant whose actions on the night of Mr. Swaim’s
20 death are described with specificity in the complaint, the Report recounts many
21 other individual defendants passing by Mr. Swaim’s room that night. (ECF No.
22 17-1.) The Report references each of the eighteen individual defendants in some
23 capacity.

24
25 ³ A document may be incorporated by reference into a complaint under Fed. R. Civ. P. 10(c) if the
26 plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim,
27 even if the document is not attached to the complaint. *United States v. Ritchie*, 342 F.3d 903, 908
28 (9th Cir. 2003). The individual defendants argue that the Report should not be considered as
incorporated by reference to the complaint since it was not referred to extensively, but rather only
in ¶ 52. However, ¶ 52 of the complaint is long and contains multiple sub-paragraphs.
Furthermore, the report is integral to the claim and its authenticity is not contested. The Court
will consider the Report as incorporated by reference for the purposes of the instant motion.

1 The fact that there are numerous individual defendants included in these
2 allegations does not serve to relieve all the individual defendants from suit at this
3 stage. It is possible that some or all of the individual defendants may be dismissed
4 at the summary judgment stage if it is shown that any individuals did not
5 personally participate in Mr. Swaim's care during the time period in question. At
6 this stage, taking all the allegations in the complaint as true, Ms. Swaim presents
7 a claim for relief that is plausible on its face.

8 Since Ms. Swaim states a claim for a constitutional violation, qualified
9 immunity would be appropriate only if it was not clearly established that the
10 conduct in question was a constitutional violation at the time of the conduct. Ms.
11 Swaim argues that *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232 (9th Cir.
12 2010), clearly established liability for deliberate indifference to a pretrial
13 detainee's mental health needs that result in the detainee's suicide. As a
14 threshold matter, there is no dispute that Plaintiff had a serious medical need or
15 that there was a substantial risk of serious harm. The need to provide psychiatric
16 care requires that prison officials monitor detainees whom they know are
17 suicidal. *See Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1018 (9th Cir. 2010);
18 *see also Clouthier*, 591 F.3d at 1241 (applying the deliberate indifference standard
19 to the plaintiffs' claim that "correction facility officials violated pretrial detainees'
20 constitutional rights by failing to address their medical needs (including suicide
21 prevention)."). A suicide risk rises to the level of "serious medical need" for the
22 purpose of deliberate indifference where there is a "heightened suicide risk or an
23 attempted suicide." *Conn v. City of Reno*, 591 F.3d 1081, 1095 (9th Cir. 2009)
24 (citation omitted), *judgment vacated on other grounds sub nom. City of Reno v.*
25 *Conn*, 563 U.S. 915 (2011), *op'n reinstated in relevant part*, 658 F.3d 897 (9th Cir.
26 2011); *see also Simmons*, 609 F.3d at 1018 ("[A] heightened suicide risk can
27 present a serious medical need.") (citation omitted).

28 The Court agrees that liability for this conduct was clearly established. The

1 individual defendants do not contest *Clouthier* and the cases cited therein but
2 rather argue that liability cannot have been clearly established because the
3 complaint does not describe the actions of the individual defendants with
4 specificity. However, as described above, the Court finds that Ms. Swaim's
5 complaint states a claim against the individual defendants. Qualified immunity
6 is not appropriate at this stage.

7 Finally, the individual defendants argue that Ms. Swaim should not be
8 permitted to seek damages under Article 1, § 8 of the Nevada Constitution, for
9 deliberate indifference to a serious medical need since there is no private right of
10 action under the Nevada Constitution against Nevada officials in their individual
11 capacities. (ECF No. 16 at 6.) Ms. Swaim responded that this issue had been
12 certified to the Supreme Court of Nevada by this Court in another case and was
13 awaiting decision. (ECF No. 17 at 13–14.) Since that time, it appears that the
14 Supreme Court of Nevada has issued a decision on the matter which reframed
15 the certified questions and did not answer the question of whether Article 1, § 8
16 of the Nevada Constitution has an implied private right of action for damages.
17 *Mack v. Williams*, 138 Nev. Adv. Op. 86 (2022). The Supreme Court of Nevada
18 noted that there is not any Nevada precedent which establishes a private right of
19 action for damages under Article 1, § 8 of the Nevada Constitution. *Id.*
20 Accordingly, the Court will grant the individual defendants' motion to dismiss Ms.
21 Swaim's claim for damages under the Nevada Constitution. Because it appears
22 that any putative claim for damages for deliberate indifference to a serious
23 medical need under Article 1, § 8 of the Nevada Constitution would be duplicative
24 of the deliberate indifference claim under the Fourteenth Amendment, the Court
25 declines to reach the question of whether there is a private right of action for
26 damages under Article 1, § 8 of the Nevada Constitution.

27 **IV. CONCLUSION**

28 It is therefore ordered that the State of Nevada *ex rel.* DPBH's motion to

1 dismiss (ECF No. 6) is granted.

2 It is further ordered that the State of Nevada *ex rel.* DPBH be dismissed
3 from this case for lack of subject matter jurisdiction.

4 It is further ordered that Ms. Swaim's second, third, and fourth claims for
5 relief be dismissed for lack of subject matter jurisdiction.

6 It is further ordered that the individual defendants' motion to dismiss (ECF
7 No. 16) is granted with respect to Ms. Swaim's claim for damages under Article
8 1, § 8 of the Nevada Constitution and denied in all other aspects.

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11 DATED THIS 3rd day of February 2023.
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15 ANNE R. TRAUM
16 UNITED STATES DISTRICT JUDGE
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